Supreme Court, U.S.
FILED
DEC 22 2010
OFFICE OF THE CLERK

(2)

No. 10-578

In the Supreme Court of the United States

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, ET AL.,

Petitioners,

v.

GRAND RIVER DAM AUTHORITY, an agency of the State of Oklahoma,

Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals of Oklahoma, Second Division

BRIEF IN OPPOSITION

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December 22, 2010

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QUESTIONS PRESENTED

I. This case presents a dispute between an agency of the State of Oklahoma and various Oklahoma rural water districts and private parties over rights to the use of the waters of the Grand River, which is a non-navigable stream that is located wholly within the State of Oklahoma. Is there jurisdiction to review the state court decision below under these facts pursuant to 28 U.S.C. § 1257(a)? More specifically, does this dispute involving *intrastate* parties and property present a federal question under the Commerce Clause of the United States Constitution, U.S. Const., Art. I, § 8, cl. 3 (the "Commerce Clause"). Likewise, does this dispute present a federal question under the "federal common law" that should be adjudicated in this Court?

II. Petitioners contend in their Petition For A Writ of Certiorari to this Court ("Petition") that the decision of the Oklahoma Court of Civil Appeals ("State Appeals Court") wrongly decided Respondent's "ownership" in the waters of the Grand River. They also contend that the State Appeals Court misinterpreted Respondent's rights under state law, which expressly permits Respondent to sell Petitioners water from the Grand River. Petitioners contend that the State Appeals Court's decision on these points is "repugnant" to the Commerce Clause. Petitioners suggest that this alleged unconstitutionality supports appellate jurisdiction in this Court under Section 1257(a). However, Petitioners never "pressed" any constitutional challenge under the Commerce Clause to any state court below, and those courts did not "pass upon" that issue. Does this Court have jurisdiction under these circumstances to hear Petitioners' appeal?

III. Did the written decision of the State Appeals Court from which Petitioners appeal (the "State Court Decision") rest upon independent and adequate state law grounds?

LIST OF PARTIES

The Petitioners are:

Wagoner County Rural Water District No. 2;
Wagoner County Rural Water District No. 7;
Wagoner County Rural Water District No. 9;
Cherokee County Rural Water District No. 11;
Peggs Water Company; and
Tri-B Nursery, Inc.

The Respondent is:

Grand River Dam Authority, an agency of the State of Oklahoma

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STATEMENT OF JURISDICTION

Petitioners allege without any elaboration that jurisdiction of their appeal herein is proper under 28 U.S.C. § 1257. Pet. 2. Respondent agrees this provision controls whether this Court has jurisdiction over Petitioners' appeal. Respondent disagrees that Petitioners have properly invoked this provision for the reasons explained *infra*.

STATEMENT OF THE CASE

The Grand River is a non-navigable stream that is located wholly within the State of Oklahoma. In 1935, the Oklahoma Legislature passed the Grand River Dam Authority Act, Okla. Stat. tit. 82, § 861 *et seq.* (the "Act"), which created a "conservation and reclamation district for the waters of the Grand River." The Act further created and authorized Respondent Grand River Dam Authority, *inter alia*, to "control, store and preserve ... the water of the Grand River and its tributaries for any useful purpose and to use, distribute and sell the same within the boundaries of the district. ..." *Id.*, § 862.

Petitioners consist of rural water districts and related end users located in Northeastern Oklahoma. They have purchased water from the Grand River from Respondent under permit for decades and without complaint. Beginning in 2007, Petitioners decided they no longer needed to pay for the water that the Act expressly authorizes Respondent to sell them. Therefore, Petitioners sued Respondent in the United States District Court for the Northern District of Oklahoma. They sought injunctive relief prohibiting Respondent from selling them water from the Grand

River, a declaration that Respondent does not own the water, and recoupment of all monies paid to Respondent for Petitioners' previous purchases of water. Petitioners' theory of the case was premised entirely on this Court's holding in *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960) (the "1960 Case"). According to Petitioners, the 1960 Case held that Respondent does not own any right, title or interest in the waters of the Grand River. The District Court and the Tenth Circuit Court of Appeals ("Tenth Circuit") rejected this argument, finding that the 1960 Case was merely a "takings case" under the Fifth Amendment to the United States Constitution. The Tenth Circuit also found that the 1960 Case did not decide any property rights issues in the waters of the Grand River.[1]

After losing in federal court, Petitioners sought identical relief against Respondent in the Craig County District Court, State of Oklahoma ("State Trial Court"). Pet. App. 38a-52a. Like the federal action, Petitioners hinged their claims for relief entirely on the 1960 Case. *Id.*, 45a-47a. Respondent subsequently sought and was granted dismissal of Petitioners' state court petition for failure to state a claim upon which relief can be granted. Pet. App. 20a-21a. Respondent argued, and the State Trial Court found in its Order Dismissing Case, that the Act permits Respondent to sell Petitioners water from the Grand River. *Id.*, 21a.

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[1] *Wagoner County Rural Water Dist. No. 2, et al. v. Grand River Dam Auth.*, 577 F.3d 1255, 1259 (10th Cir. 2009); *Wagoner County Rural Water Dist. No. 2, et al. v. Grand River Dam Auth.*, 625 F. Supp. 2d 1162, 1168 (N.D. Okla. 2008). Respondent was ultimately dismissed from the federal district court action on sovereign immunity grounds.

Petitioners then appealed the State Trial Court's order of dismissal to the Oklahoma Supreme Court ("State Supreme Court") under Oklahoma's "fast track" appellate procedure. Under this procedure, an appellant may appeal an order of an Oklahoma state trial court to the State Supreme Court, which either retains the appeal or assigns it to the State Appeals Court. Okla. Sup. Ct. R. 1.36(f). The appellate court decides the issue on the briefs and pleadings filed in the state trial court action. Parties are not required to submit additional briefing to the appellate court unless otherwise ordered. *Id.*, R. 1.36(g).

In the case below, the State Supreme Court assigned Petitioners' appeal to the State Appeals Court, which did not order additional briefing. On May 7, 2010, the State Appeals Court issued the State Court Decision, which upheld the State Trial Court's order of dismissal. Pet. App. 1a-19a. The State Appeals Court determined that under federal law states generally have the superior right to their non-navigable waters. *Id.*, 7a-8a. The court further rejected Petitioners' interpretation of the 1960 Case. *Id.*, 10a-11a. Finally, the State Appeals Court found that the Act and decisions from the State Supreme Court authorize Respondent to sell Petitioners water from the Grand River, which are not preempted by federal law. *Id.*, 5a-8a, 11a-12a, 14a-19a.

After losing in the State Appeals Court, Petitioners sought discretionary review with the State Supreme Court. Pet. App. 53a-69a. In their petition for writ of certiorari to the State Supreme Court, Petitioners took a different tact in their quest for free water. They substantially abandoned their argument that the 1960 Case decided any water rights that *Respondent* had or

claimed in the *Grand River*. *Id.* Instead, Petitioners argued for the first time that *Oklahoma* does not own *any water* within its boundaries, citing various decisions from this Court and the Tenth Circuit in support (the "New Federal Cases").[2] *Id.* On September 20, 2010, the State Supreme Court denied discretionary review without decision. Pet. App. 23a-24a.

As further discussed *infra*, the action in the Oklahoma state courts below concerns an *intrastate* water rights dispute between an Oklahoma state agency and Oklahoma plaintiffs involving a non-navigable stream that is located wholly within Oklahoma. This type of dispute does not present a federal question, either under the United States Constitution, federal common law or any other bases for federal court jurisdiction. Even if Petitioners have presented a proper federal question to this Court under the Commerce Clause, they did not "press" this question to any Oklahoma state court, and no Oklahoma court "passed upon" this question. Pet. App. 38a-52a; App. 1b-36b; Pet. App. 20a-21a; 1a-19a; 53a-69a; 23a-24a. The first time that Petitioners have ever raised a question under the Commerce Clause is in their Petition to this Court. Pet. 8, 13. Finally, the State Appeals Court's decision also rested upon independent and adequate state law grounds. The Act and settled case law from the State Supreme Court

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[2] The New Federal Cases include: *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Douglas v. Seacost Products, Inc.*, 431 U.S. 265 (1977); *United States v. Chandler Dunbar Water Power Co.*, 229 U.S. 53 (1913); and *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008).

have long held that Respondent is expressly authorized to sell water from the Grand River to Petitioners and others. This right fits squarely within Oklahoma's broader right to regulate, control and appropriate water rights within its non-navigable waterways for the public's benefit. These broader rights are consistent with Oklahoma's police power to protect its public water interests and Oklahoma's mutual, complimentary use of its water by public and private interests. Such rights are not in conflict with this Court's holdings as it relates to a state's interest in its internal waters.

REASONS FOR DENYING THE PETITION

I. PETITIONERS HAVE NOT PRESENTED A FEDERAL QUESTION FOR REVIEW UNDER 28 U.S.C. § 1257

Pursuant to 28 U.S.C. § 1257(a), final decisions by the highest state court may be reviewed by certiorari when the validity of a federal treatise or statute, or of a state statute seen as repugnant to federal law, is drawn into question.[3] Any federal issue that the Court reviews must be "substantial." *Zucht v. King*, 260 U.S. 174, 176 (1922); Sup. Ct. R. 10 (referring to "important federal question[s]" or "an important question of federal law"). Merely alleging a federal question does not give rise to jurisdiction; rather, the case must turn on a "real and not merely a formal Federal question." *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308,

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[3] Section 1257(a) jurisdiction also exists when any title, right, privilege or immunity is specially set up or claimed under federal law. Petitioners do not allege this circumstance in their Petition.

311 (1902). Moreover, the Court will not consider questions so lacking in substance that no further argument is required. This includes issues that have already been determined and frivolous claims. *E.g.*, *Hodges v. Snyder*, 261 U.S. 600, 601 (1923); *Hamilton v. Regents of the Univ. of California*, 293 U.S. 245, 258 (1934); *Crumpacker v. Indiana Supreme Court Disciplinary Comm'n*, 470 U.S. 1074, 1074-1075 (1985) (Burger, C.J., concurring).

Petitioners allege that the State Appeals Court's interpretation of the Act and Respondent's water rights in the Grand River are repugnant to the Commerce Clause. Pet. 8, 13. They also appear to allege that a federal question exists for review under federal common law based on the 1960 Case and the New Federal Cases. Pet. 4-6. These are the only two conceivable bases for jurisdiction under Section 1257, and neither present a federal question. Petitioners do not allege that the Act is repugnant to a federal statute, any acts or regulations of a federal administrative agency, admiralty or maritime law, the laws of the District of Columbia or a treatise with another country.

A. There Is No Commerce Clause Issue Present Here

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const., Art. I, § 8, cl. 3. Although the Constitution does not expressly limit the power of states like Oklahoma to regulate commerce, the Court has long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal

statute. *E.g.*, *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citations omitted). In order to determine whether a state law violates "this so-called 'dormant' aspect of the Commerce Clause," the Court uses a two part test. First, the Court asks whether the state law discriminates on its face against interstate commerce. *Id.* (citations omitted). In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* (citations omitted). Discriminatory laws "motivated by 'simple economic protectionism' are subject to a 'virtually *per se* rule of invalidity,' which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose." *Id.* (citations omitted).

If the state law does not discriminate on its face, the Court utilizes the test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), in order to determine if the law offends the Commerce Clause. *United Haulers*, 550 U.S. at 346. This test is reserved for laws "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Id.*, *quoting Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Under the *Pike* test, the Court will uphold a nondiscriminatory statute "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.*, *quoting Pike*, 397 U.S. at 142.

Petitioners have not presented an issue under the dormant Commerce Clause to this Court. The dispute below concerns Petitioners' challenge to Respondent's authority under the Act to sell them water from the

Grand River. The Act does not facially discriminate against out-of-state interests. It is directed solely towards in-state interests. The Act only authorizes Respondent to sell water from the Grand River to parties in the reclamation district, which lies within Oklahoma. Okla. Stat. tit. 82, § 861 (creating the reclamation district and listing the Oklahoma counties that are within the district); *Id.*, § 862(a) (stating, *inter alia*, that Respondent may sell the waters of the Grand River only "within the boundaries of the district"). No entity outside of Oklahoma purchases the water from Respondent or claims an interest in the water at issue. Respondent does not transport the water from the Grand River outside of Oklahoma for sale to non-residents and is not authorized to do so under the Act. *Id.*, § 862 (listing the specific powers, rights and privileges of Respondent in and to the reclamation district, including the waters of the Grand River). There simply is no viable contention that the Act provides differential treatment that benefits in-state economic interests at the expense of out-of-state interests.

Given that Respondent's authority under the Act to sell water is nondiscriminatory and directed towards local concerns, the issue then concerns whether the Act creates an *excessive* burden that is imposed upon *interstate* commerce. There is no such burden imposed here. Every economic activity associated with Respondent's sales of water from the Grand River to Oklahoma residents within the reclamation district as defined in the Act occurs within Oklahoma. It is a

purely *local activity* for legitimate purposes[4] that does not have even an *incidental* effect on interstate commerce.

A party challenging the validity of a state statute under the dormant Commerce Clause has the burden to show that it discriminates against out-of-state interests. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Far short of meeting this burden, Petitioners have not even alleged same as it relates to Respondent's sales of water under the Act. Instead, Petitioners simply allege a constitutional challenge under the Commerce Clause without any support or analysis. But upon closer examination, no such Commerce Clause issue exists here even under the most liberal reading of this Court's dormant Commerce Clause jurisprudence.[5]

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[4] *See* discussion in Part III, *infra*, regarding Oklahoma's rights under its police power to regulate the waters of the Grand River under the Act for beneficial purposes.

[5] There is no Commerce Clause issue here even under the Court's non-dormant Commerce Clause cases involving federal laws or statutes that might be repugnant to the Constitution. *E.g.*, *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (listing three general categories where Congress may use its commerce power). Sales of water from the Grand River under the Act do not implicate any channels or instrumentalities of interstate commerce or activities that substantially affect interstate commerce. *Id.* It is a purely local activity that has no effect on interstate commerce for the reasons explained above.

B. There Is No Federal Common Law Issue Present Here

If federal common law governs a case, the case presents a federal question within the subject matter jurisdiction of federal courts. *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972). However, "the various bailiwicks of federal common law are limited in number." *Woodward Governor Co. v. Curtiss-Wright Flight Sys., Inc.*, 164 F.3d 123, 126 (2d Cir. 1999), *citing O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) ("... cases in which judicial creation of a special federal rule would be justified ... are ... 'few and restricted,'"), *quoting Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

The Court has spoken on several occasions regarding when federal common law applies in a federal lawsuit. *See Atherton v. FDIC*, 519 U.S. 213, 218 (1997); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-07 (1997). The Court has explained that, as a threshold matter, a case must implicate "uniquely federal interests" for federal common law to apply. *Boyle*, 487 U.S. at 504 (internal quotation marks omitted). As Justice Scalia explained in *Boyle*, such interests arise only in a few instances, including: (1) the obligations to, and rights of, the United States under its contracts; (2) the liability of federal officers for official acts; and (3) civil liabilities arising out of federal procurement contracts. *Id.* at 504-06.

Even when "uniquely federal interests" are implicated, federal common law applies only when there is a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87. *See also Boyle*, 487 U.S. at 504. A

"significant conflict" arises when the application of state law would run counter to a federal policy or interest. *See O'Melveny*, 512 U.S. at 87-88. In the absence of a significant conflict, "a mere federal interest in uniformity is insufficient to justify displacing state law in favor of a federal common law rule." *B.F. Goodrich v. Betkoski*, 112 F.3d 88, 90 (2d Cir. 1997) (per curiam), *cert. denied sub nom. Zollo Drum Co., Inc. v. B.F. Goodrich Co.*, 118 S. Ct. 2318 (1998); *see O'Melveny*, 512 U.S. at 88. Finally, an actual, significant conflict between a federal interest and state law must be "specifically shown," and not generally alleged. *Atherton*, 519 U.S. at 218; *O'Melveny*, 512 U.S. at 87-88.

The case below does not present an issue of federal common law. There are no "uniquely federal interests" present or a "significant conflict between some federal policy or interest" implicated by the dispute below. As discussed *supra*, Respondent's sales of water to Oklahoma residents within the reclamation district is a purely local activity that has no effect on interstate commerce. Moreover, the United States is not a party to the lawsuit below and does not claim an interest adverse to Respondent in the water that is sold to Petitioners. The United States has never objected to Respondent's sales of water from the Grand River under the Act in any court or proceeding. There is no issue involving civil liability arising out of the performance of a federal procurement contract. The facts and legal issues here do not fall within any of the instances of federal common law identified in *Boyle*. It is hard to imagine a federal common law issue under these facts. There is no persuasive reason for expanding the narrow scope of federal common law to a dispute involving intrastate parties, activities and

property that does not encompass a federal interest or involve the federal government.

C. Petitioners' Reliance Upon The 1960 Case And The New Federal Cases Does Not Create A Federal Question Because They Are Inapposite

Petitioners suggest that they raised a "federal question" in citing to the 1960 Case, which they contend decided Respondent's water rights in the Grand River. Pet. 4-6. Petitioners also suggest that they presented a "federal question" in framing the issue before the State Appeals Court as whether Oklahoma "owned" any of its waters, including the Grand River. *Id.* Petitioners claim that the State Appeals Court wrongly decided this issue when considering the New Federal Cases. Pet. 11-12. Petitioners' belated attempt to create federal question jurisdiction on these grounds is without merit. Petitioners have grossly misconstrued the holding in the 1960 Case, and the New Federal Cases are inapposite to the facts and legal issues present here. None support Petitioners theory of "state ownership" of Oklahoma's waters.

The 1960 Case was a "takings" case under the Fifth Amendment involving competing interests between the United States and Respondent to the non-navigable flow of the Grand River for the sole purpose of *developing hydroelectric power projects*. The United States had condemned land that Respondent owned to build its own hydroelectric project at Ft. Gibson on the Grand River, for which it paid Respondent compensation. 363 U.S. at 230. Respondent claimed more compensation was due for the additional "taking"

of its *water power rights* at Ft. Gibson and its franchise to develop electric power and energy at that site. *Id.* The Court held that Respondent was not entitled to additional compensation from the Untied States under the Fifth Amendment, because under the Commerce Clause the United States had the superior right to develop the hydroelectric project at Ft. Gibson or license another to do it. 363 U.S. at 236.

The 1960 Case did *not* decide Respondent's property rights in the waters of the Grand River itself as Petitioners contend. The Court was clear on this point:

> The Government contends that the navigational servitude of the United States extends also to nonnavigable waters [of the Grand River], pre-empting state-created property rights in such waters, at least when asserted against the Government. In the view we take in this case, however, it is not necessary that we reach that contention.

Id. at 232. The Tenth Circuit, which is the only federal appellate court to have considered Petitioners' position on this issue, is in accord with the Court's statement above:

> In addition, and contrary to the plaintiffs' assertion, the takings case did not determine the extent (if any) of GRDA's ownership interest in the Grand River water itself. Rather, the sole issue was whether the United States owed any additional compensation to GRDA for taking GRDA's purported interests in water

> power and developing electric power and energy at Fort Gibson Dam.

577 F.3d at 1259. *See also Grand River Dam Authority*, 625 F. Supp. 2d at 1168 ("The 1960 Case ... resolved only one issue: whether the United States had committed a 'taking' under the Fifth Amendment."). The State Appeals Court, which is the only state appellate court to have considered Petitioners' argument concerning the holding of the 1960 Case, is also in accord:

> This case does not hold, as the Water Districts argue, that the GRDA failed to prove that it had any right to the water in the Fort Gibson reservoir. In fact, the Supreme Court specifically refused to reach the issue argued by the United States: the federal government's right to navigable water preempts state created property rights to non-navigable water. The case merely holds that the right of the GRDA to produce electricity from the Fort Gibson reservoir was inferior to the right of the federal government to do so.

Wagoner County Rural Water Dist. No. 2. v. Grand River Dam Auth., 241 P.3d 1132, 1136 (Okla. Civ. App. 2010). *See also* Pet. App. 10a-11a.

The 1960 Case cannot be used to manufacture federal question jurisdiction because it did not decide any competing claims of ownership in the waters of the Grand River. There simply is no "uniquely federal interest" created by this case. This is particularly true given that the United States, as noted, is not a party to the case below, does not assert an interest adverse

to Respondent relative to its rights to sell water of the Grand River and has never challenged Respondent's authority under the Act to appropriate water from the Grand River for beneficial purposes. It is also true given that the 1960 Case is a takings case, Petitioners were not a party to that case and they do not claim an interest in the waters of the Grand River.

The New Federal Cases upon which Petitioners rely similarly do not create federal question jurisdiction. Petitioners contend these cases support the notion that Oklahoma has no interest in its waters until the water has "been reduced to possession ... through physical capture and control." Pet. 13. These cases are inapposite because they, unlike this case, actually implicate interstate commerce. In *Sporhase v Nebraska*, the plaintiff challenged a state's right to restrict the sale of groundwater to out-of-state residents. In *Hughes v. Oklahoma*, the plaintiff challenged an Oklahoma statute that forbid a person from transporting or shipping minnows for sale outside of the state that were seized or procured from waters within the state.[6] These cases each found that water

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[6] *See Sporhase v. Nebraska*, 458 U.S. 941 (1982); *Hughes v. Oklahoma*, 441 U.S. 322 (1979). *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), involved whether a Virginia statute could prohibit federally licensed vessels owned by non-residents from fishing in Virginia waters. This was held to violate the Supremacy Clause, and thus, a competing federal interest in water. *Id.* at 286-87. The Court decided the water rights issue in that context, which is not present in this case. *United States v. Chandler Dunbar Water Power Co.*, 229 U.S. 53 (1913), involved a condemnation proceeding instituted by the United States under a federal statute concerning navigable waters located in Michigan. That case, unlike this one, also involved a competing federal interest to water. None of the cases relied upon by Petitioners

or wildlife were articles of commerce, not articles of state ownership. Perhaps "ownership" of property is relevant when adjudicating particular *interstate* water or property rights disputes under the Commerce Clause, which implicates a paramount federal interest. But it is clearly not relevant in adjudicating disputes between *intrastate* parties, activities and property located wholly within the state's borders, which does not implicate the Commerce Clause or any federal or interstate interests.

Petitioners' reliance upon *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008) also does not help them. That case involved a challenge under the dormant Commerce and Supremacy Clauses to an Oklahoma statute that prevented a Texas water district from appropriating or purchasing surface water located in Oklahoma. *Id.* at 909-10. Like *Sporhase* and *Hughes*, but unlike this case, *Tarrant* involved a property dispute between interstate parties. Moreover, the case did not even decide the interstate property rights dispute. It held merely that the case was ripe for appeal, that the Oklahoma state agency at issue was not protected by Eleventh Amendment immunity, and that the court did not have jurisdiction to consider defendants' appeal of the district court's refusal to abstain under the *Younger* doctrine. *Id.* at 915. The facts and holdings in *Tarrant* are clearly distinguishable from the dispute and issues here. Finally, *Tarrant* did not hold, as Petitioners contend, that "Oklahoma does not enjoy an 'ownership interest'

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involve intrastate parties, activities and rights to internal waters located within a state.

in water resources located in the state."[7] This was not the issue before the court. Pet. 11; *Id.* at 913. This statement at best is *dicta*, as it was made in the context of whether the Oklahoma state agency had a cognizable Eleventh Amendment immunity defense, which is not at issue in this case.

Indeed, Petitioners have undoubtedly painted much too broad of a brush in their interpretation of the New Federal Cases even if they presented analogous facts. If, as Petitioners contend, this Court and the Tenth Circuit in *Tarrant* actually held that a state has *no property ownership interest in its water resources whatsoever*, this Court and the *Tarrant* court would have contradicted their prior jurisprudence, including in particular settled precedent involving the equal footings doctrine. This doctrine posits that the original Thirteen Colonies, as sovereign entities, owned the

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[7] The *Tarrant* court cited to *Sporhase* for this proposition. *Id.* at 913. However, the Court in *Sporhase* also recognized that even if water is an article of commerce, "the existence of unexercised regulatory power does not foreclose state regulation of its water resources, [or] of the uses of water within the State, or indeed, of interstate commerce in water." 458 U.S. at 954 (citations omitted). This statement diminishes any statement in *Tarrant* regarding Oklahoma's water rights in its internal waters particularly when, as here, there is no competing or paramount federal interest or interstate property dispute. This statement also supports the notion that Respondent may sell water to Petitioners under the Act as part of its regulatory function as long as doing so does not infringe on a paramount federal interest. *See e.g., Day v. Armstrong*, 362 P.2d 137, 143 (Wyo. 1961) ("However, except when so used or available for use in interstate or international commerce, the exclusive control of waters is vested in the state, whether the waters are deemed navigable in the Federal sense or in any other sense."), *citing, inter alia, Donnelly v. United States*, 228 U.S. 243 (1913).

absolute right to all of their navigable waters.[8] When subsequent states like Oklahoma entered the Union, they did so on an equal footing with the original Thirteen Colonies and similarly retained ownership over their sovereign lands and waters. Hence, if what Petitioners say in their Petition is true then the equal footings doctrine would be turned on its head. Of course this is not true, as the equal footings doctrine has been recognized as settled law since the time of the Founding Fathers.

D. This Court's Water Rights Cases Support Respondent's Statutory Function And Rights In The Grand River Under The Act

Prior decisions from this Court belie the notion that Oklahoma does not have an interest in any of its water resources and is precluded under the Act from managing, appropriating and selling such water to others for beneficial purposes. These decisions demonstrate that a state's property interest and rights in water located within its borders has long been settled and is not in controversy. The State Appeals Court did not wrongly decide the dispute below based upon its determination of Respondent's interest in the waters of the Grand River.

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[8] *E.g.*, *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 283-84 (1997). The Tenth Circuit discussed and applied the equal footings doctrine in *Koch v. U.S. Dep't of Interior*, 47 F.3d 1015, 1018-19 (10th Cir. 1995). It is inconceivable that the Tenth Circuit in *Tarrant* held that a state owns *no* interest in water, because under the equal footings doctrine states clearly do have such ownership interests.

In *California v. United States*, the Court stated that "as to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise." 438 U.S. 645, 662 (1978), *quoting United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). The Court also stated that "there are two limitations to the State's exclusive control of its streams - reserved rights 'so far as may be necessary for the beneficial uses of the government property' ... and the navigational servitude." *Id.* Finally, the Court stated that "except where the reserved rights or navigational servitude of the United States are invoked, the State has total authority over its internal waters." *Id.* In *Nevada v. United States*, the Court stated that, at least as it relates to states subject to the Desert Land Act of 1877, "[a]cquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states." 463 U.S. 110, 123-24 (1983) (citations omitted). In *Kansas v. Colorado*, the Court stated that "[e]ach State has full jurisdiction over the lands within its borders, including the beds of streams and other waters." 206 U.S. 46, 93 (1907) (citations omitted). And in *United States v. Cress*, the Court stated that:

> The states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks ... , subject however, in the case of navigable streams, to the paramount authority of Congress to control

> the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations ..., the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation.

243 U.S. 316, 320-21 (1917) (citations omitted). *See also Fox River Paper Co. v. Railroad Com'n of Wisconsin*, 274 U.S. 651, 655 (1927) ("Although presumptively title to the soil under navigable waters within the state is in the state ... , the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state.") (citations omitted); *North Shore Boom Co. v. Nicomen Boom Co.*, 212 U.S. 406, 412 (1909) ("The river in question is a navigable stream, entirely within the state of Washington, and, in the absence of any statute by Congress, a state has plenary power in regard to such waters.").[9]

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[9] Petitioners' argument concerning Oklahoma's interest in its intrastate waters also contradicts hornbook water rights law. *See* 78 Am. Jur. 2d *Waters* § 138 (2002) ("As a general rule ... each state has the power to regulate and control the navigable or public waters within its own boundaries. As to waters which lie wholly within a state, and which do not constitute a part of the navigable waters of the United States, the authority of the state is complete and exclusive....") (citations omitted); 94 C.J.S. *Waters* § 345 (2001) (stating, *inter alia*, that "[a] state owns the underlying fee to all of the water in a state and thereby may retain substantial regulatory power over water rights" for the general welfare subject to any paramount federal interests) (citations omitted).

Petitioners' attempts to manufacture a federal question under the Commerce Clause and federal common law fail. None of the cases that Petitioners cite suggest otherwise. Unlike this case, Petitioners' cases involve competing federal interests and interstate disputes and property rights issues. Petitioners do not cite to a single case holding that a dispute involving intrastate parties, activities and property presents a federal question.[10] Respondent is not aware of any such cases. As the cases above demonstrate, the Court has long held that so long as no paramount federal interests are involved, a state's interest in its internal waters is plenary and absolute.

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[10] Petitioners question the State Appeals Court's reliance upon *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). Pet. 7. The State Appeals Court cited *Hudson* for the proposition that states generally own the superior right to their non-navigable water. Pet. App. 7a; 209 U.S. at 356. Petitioners claim that the court's reliance upon *Hudson* is erroneous, because *Hudson* relied upon *Geer v. Connecticut*, 151 U.S. 519 (1896), which this Court overruled in *Hughes v. Oklahoma* along with the notion of "state ownership" of wild animals. 441 U.S. at 325. It is important to remember that the "state ownership" question in *Hughes* and later *Sporhase*, upon which Petitioners base most of their legal argument herein regarding Respondent's rights under the Act, was decided in the context of a dispute under the Commerce Clause and interstate commerce. *Hudson*'s citation to *Geer* occurred in the context of a Commerce Clause issue. *Sporhase*, 458 U.S. at 947; 209 U.S. at 357. This issue, as discussed, is not present here. The proposition in *Hudson* relied upon by the State Court Appeals court occurred in relation to the just compensation claim, which constituted most of the opinion and did not depend upon *Geer*. *Id.* at 946; 209 U.S. at 356. *Hudson* is also consistent with this Court's water rights cases cited herein. A state has an interest in and control over its intrastate waters subject to any paramount federal interest that may exist, which in this case does not exist.

Petitioners cannot present a federal question for review herein under Section 1257(a).

II. PETITIONERS' CONSTITUTIONAL CHALLENGE TO THE ACT WAS NOT "PRESSED OR PASSED UPON BELOW"

Even if Petitioners presented a proper challenge under the Commerce Clause for review in this Court, they failed to press that challenge in the state courts below, and those courts failed to pass upon this issue. Jurisdiction to hear Petitioners' appeal in this Court fails for this reason.

In *Yee v. Escondido*, 503 U.S. 519 (1992), the Court reiterated that in reviewing the judgments of state courts under 28 U.S.C. § 1257, "the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below." *Id.* at 533, *citing Illinois v. Gates*, 462 U.S. 213 (1983). The policy behind the Court's "not pressed or passed upon below" rule is premised on comity to the states and the need for a properly developed record on appeal. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). As stated in *Cardinale v. Louisiana*, 394 U.S. 437 (1969):

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first

> opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, ... they should be given the first opportunity to consider them.

Id. at 439 (citation omitted). *See also Webb v. Webb*, 451 U.S. 493, 499 (1981) (stating the same).

The Court has stated that when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party can affirmatively show otherwise. *E.g., Street v. New York*, 394 U.S. 576, 582 (1969); *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). *See also Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308 (1903) (stating that a petitioner desiring to show that a claim was raised may rely upon a "pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court"). The Court will look to local law to determine when federal questions should be timely raised. Regardless of whether local, general, or federal rights are in dispute, each state "prescribe[s] the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its courts." *John v. Paullin*, 231 U.S. 583, 585 (1913) ("Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, ...").

Under Oklahoma law, "[w]here parties seeking to question the constitutionality of a statute and fail specifically to point out the unconstitutionality, and cite no authority in support thereof, this court is not required to review such question." *In re Conservancy Dist. No. 37*, 398 P.2d 525, 530 (Okla. 1965) (citation omitted). Similarly, "[t]he general rule in Oklahoma concerning appeals from the District Court is that the Supreme Court will confine its appellate review to issues which were presented below." *McKinney v. Harrington*, 855 P.2d 602, 604 (Okla. 1993) (citations omitted). *See also In re Askins Prop.*, 161 P.3d 303, 309 (Okla. 2007) ("[A] question of law presented and argued on appeal that is not shown to arise under the facts and record will not be considered and determined.") (quotation omitted).

Petitioners did not plead a constitutional claim in their petition below or even allege that the Act was unconstitutional therein. Pet. App. 38a-52a. They did not raise or suggest a challenge to the Act under the Constitution in their opposition to Respondent's motion to dismiss in the State Trial Court. App. 1b-36b. Not surprisingly, the State Appeals Court did not address or refer to a constitutional question or challenge to the Act in its written opinion.[11] Petitioners similarly did not press a constitutional challenge in their petition for discretionary review with the State Supreme Court, which denied the petition without decision. Pet. App. 53a-69a, 23a-24a.

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[11] This perhaps explains why the State Appeals Court framed the issue on appeal as follows: "The dispositive issue in this appeal requires a determination of the ownership of the water sold by the GRDA to the Water Districts." Pet. App. 4a.

On these facts Petitioners clearly failed to make a proper presentation of their constitutional challenge in this Court under the Commerce Clause to the Oklahoma state courts below. They never gave Oklahoma's highest court a chance to assess the constitutionality of the Act or the decision of the State Appeals Court under the Commerce Clause before raising this issue for the first time in this Court. The *Yee* case is instructive:

> The Yees did not include a due process claim in their complaint. Nor did petitioners raise a due process claim in the Court of Appeal. It was not until their petition for review in the California Supreme Court that petitioners finally raised a substantive due process claim. But the California Supreme Court denied discretionary review. Such a denial, as in this Court, expresses no view as to the merits. ... In short, petitioners did not raise a substantive due process claim in the state courts, and no state court has addressed such a claim.

503 U.S. at 533. Another analogous case is *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987). There, appellants argued that the Unruh Act was unconstitutionally vague and overbroad. The first time that appellants raised this issue, however, was when they filed a petition for rehearing with the California Court of Appeal, which denied the petition without opinion. As in *Yee*, the Court found that it lacked jurisdiction because the appellants did not adequately present their constitutional challenge in the state system. *Id.* at 549-50 (citations omitted).

The facts of this case are worse for Petitioners than those found in *Yee* and *Rotary Club*. Like these cases, Petitioners were required under state procedural law to raise their constitutional challenge in the state district and appeals court in order to obtain review from the state's highest court. But unlike *Yee* and *Rotary Club*, Petitioners here failed even to raise a constitutional claim or issue in their petition for discretionary review to Oklahoma's highest court. Indeed, they never raised any constitutional challenge to the Act or otherwise until filing their Petition with this Court.[12] And even if Petitioners did somehow alert Oklahoma's highest court to a constitutional challenge, that court's failure to pass upon the issue in denying discretionary review is presumed to have occurred due to a want of proper presentation in Oklahoma's lower courts, which was required under

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[12] The word "unconstitutional" does not appear in *any* paper that Petitioners submitted to the lower state courts in conjunction with their argument that Respondent or Oklahoma does not "own" its waters. This includes Petitioners' state court petition, App. 38a-52a, their brief in opposition to Respondent's motion to dismiss in the State Trial Court, App. 1b-36b, and their petition for discretionary review to the State Supreme Court, Pet. App. 53a-69a. This Court has upheld the "pressed or passed upon below" rule under less onerous circumstances. *See, e.g., Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) (general or vague references will not preserve federal issues); *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) (reference to Fourteenth Amendment does not preserve claim based on unidentified Bill of Rights provision); *Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935) (statement that federal constitution was violated insufficient); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68 (1928) (reference to "unconstitutional" alone would not provide a basis for Court review).

Oklahoma procedural law and which clearly did not occur.[13]

Under no stretch of the imagination can Petitioners contend that their constitutional challenge under the Commerce Clause herein was either "pressed or passed upon" below.

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[13] In Oklahoma "where two actions between the same parties involving the same cause of action proceed at the same time in courts of concurrent jurisdiction . . . the first final judgment . . . renders the issues *res judicata* in both actions." *Brink v. Bartlett*, 294 P. 106 (Okla. 1930) (Syllabus). In *Brink* the State Supreme Court applied this principle to dismiss an appeal from an Oklahoma trial court, holding that a prior Tenth Circuit decision concerning the same parties and legal identity of the subject matter was *res judicata* as to the case on appeal before the court. *Id.* at 107. As earlier discussed, Petitioners sued Respondent for identical relief in federal court before initiating their state court lawsuit. *See* Statement of the Case, *supra*. At issue in both cases was Respondent's right to sell Petitioners water from the Grand River and whether same was permissible under the 1960 Case. *Id.* The Tenth Circuit decided the interpretation of 1960 Case against Petitioners on August 24, 2009, before the State Appeals Court entered the State Court Decision on May 7, 2010. *See* Note 1, *supra*. Petitioners then changed their argument to include the New Federal Cases in their request for discretionary review to the State Supreme Court. Pet. App. 53a-69a. The State Supreme Court likely would have dismissed Petitioners' appeal related to the 1960 Case on *res judicata* grounds. The State Supreme Court likewise would not have considered the New Federal Cases, as Petitioners failed to raise them in the petition and briefing in the State Trial Court. Pet. App. 38a-52a; App. 1b-36b. *McKinney v. Harrington;* 855 P.2d at 604; *In re Askins Prop.*, 161 P.3d at 309.

III. THE STATE COURT DECISION RESTED UPON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS

As urged *supra*, Petitioners have failed to present a federal question for review. But even if they did, and even if the State Appeals Court's resolution of such federal question was erroneous as Petitioners contend, the State Court Decision rested upon independent and adequate state law grounds.

This Court will not review a question of federal law presented in a state court case "if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (emphasis added). This limitation on the Court's jurisdiction stems from the division of power between the state and federal courts and a desire to avoid "advisory opinions." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."). The Court has held that it has no power to review state determinations of purely state law or to review federal issues that can have no effect on the state court's judgment. *E.g., Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986). Therefore, the Court has held that it will not review a decision resting on adequate and independent state grounds even if the state court has presented an erroneous view of the federal law that was presented. *E.g., Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945).

The Act established Respondent as a non-incorporated agency of the State of Oklahoma,

according it the power of government and the authority to exercise rights, including the control, storing, preservation, reclamation and distribution of the waters of the Grand River and its tributaries, for irrigation, power and other useful purposes. Okla. Stat. tit. 82, § 861. The Act also expressly authorizes Respondent to sell water from the Grand River to parties like Petitioners:

> The district shall have and is hereby authorized to exercise the following powers, rights and privileges:
>
> (a) To control, store and preserve, within the boundaries of the district, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the district...

Okla. Stat. tit. 82, § 862(a). The Act further prescribes Oklahoma's interest in the waters of the Grand River, which it authorizes Respondent to sell on its behalf:

> That the waters of Grand River in Oklahoma and the Pensacola and Markham Ferry Reservoirs, located thereon, be and are hereby determined and declared to be non-navigable and waters of the State of Oklahoma.

Id., § 887. In *Oklahoma Water Resources Board v. Central Oklahoma Master Conservancy District*, the State Supreme Court recognized Oklahoma's broad right to control and appropriate its non-navigable, public waters for beneficial purposes.

> The state is without authority to transfer one man's property to another, but its power to control unappropriated public waters is plenary. Definite nonnavigable streams are public waters. The state may either reserve to itself or grant to others its right to utilize these streams for beneficial purposes.

464 P.2d 748, 753 (Okla. 1968). In *Grand-Hydro v. Grand River Dam Authority*, the State Supreme Court further recognized Oklahoma's specific right to control and appropriate the waters of the Grand River under the Act, which it delegated to Respondent:

> The statute, *supra*, creating the Grand River Dam Authority and defining its functions purports to be an express appropriation by the State of the waters in Grand River to be applied to the uses therein stated, and to place in its said agency exclusive authority to develop the stream in the manner therein provided. The State may control the flow of all nonnavigable streams such as the Grand River. And it may reserve to itself or grant to private parties the right to utilize such streams for power and other purposes.

139 P.2d 798, 801 (Okla. 1943). Finally, the State Supreme Court found that Oklahoma's right to appropriate and control its water interests through the Legislature is consistent with its paramount police power and is *without consideration of private ownership interests*: "The Legislature may exercise its police power to protect the state's water irrespective of the rights of private owners of the land most

immediately concerned." *Jacobs Ranch, LLC v. Smith*, 148 P.3d 842, 849-50 (Okla. 2006).

The State Appeals Court relied upon the foregoing Oklahoma cases and statutes throughout its decision upholding the State Trial Court's dismissal of Petitioners' state court petition. Although the State Appeals Court addressed federal issues in its decision, the State Appeals Court could have ignored such issues and supported its decision solely under the state law authorities discussed above. These Oklahoma authorities demonstrate that Respondent is authorized to sell water from the Grand River to Petitioners and others. This right fits squarely within Oklahoma's broader right to regulate, control and appropriate water rights within its internal waterways for the public's benefit. These broader rights are consistent with Oklahoma's well-recognized police power to protect its public water interests and Oklahoma's mutual, complimentary use of its water by public and private interests. *See, e.g., Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, 855 P.2d 568, 575-77 (Okla. 1990); *see also Jacobs Ranch*, 148 P.3d at 849 ("It is a basic principle that water is a natural resource, ... , which the state may regulate for the health, welfare and safety of the people."), *citing Wyoming v. Colorado*, 259 U.S. 419 (1922), *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Natural Resources*, 504 U.S. 353, 365 n.6 (1992).

Significantly, Oklahoma's exercise of its police power under the Act does not implicate the Commerce Clause or a paramount federal interest, and its right to sell Petitioners water from the Grand River to state residents for beneficial purposes is not in conflict with this Court's water rights cases discussed above.

Likewise, resolution of the federal issues addressed by the State Appeals Court, including Oklahoma's rights to its internal water, is not in conflict with these cases. Unless a superior federal interest is involved, a state may appropriate, control, store, manage, preserve and sell water within its borders to its residents for beneficial purposes. It is clear that the State Court Decision rests upon independent and adequate state law grounds apart from any federal issues that the State Appeals Court addressed.[14]

A persuasive case is *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). This case involved a dispute between the State of Oregon and an Oregon corporation over the ownership of two portions of land underlying the Willamette River, which is navigable but not an interstate boundary. The Court held that the disputed ownership of the riverbed lands should be decided solely as a matter of Oregon law and not federal common law, given that application of

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[14] The authorities discussed *supra* demonstrate that legal "ownership" of the waters of the Grand River is not the *sine qua non* of Respondent's right to control, regulate and appropriate waters from the Grand River under its police power for beneficial purposes, which includes selling the water to others. None of these authorities require that Respondent "own" the water as a prerequisite to its right to perform its statutory functions under the Act. Petitioners do not cite to a single case standing for the proposition that before a state may exercise its police power to regulate and control its internal waters for beneficial purposes that it must first have legal "ownership" of such waters. This is not surprising given that such a case would contradict these authorities, including this Court's water rights cases cited herein, which generally posit that states may decide for themselves the rules of property ownership in their internal waters subject to any paramount federal interest.

same is required neither under the equal footings doctrine nor by any other principle of federal law. *Id.* at 381 ("We also think there was no other basis in that case, nor is there any in this case, to support the application of federal common law to override state real property law.").

Petitioners are asking this Court to ignore its prior jurisprudence, to apply federal cases that are inapposite to the parties' dispute below and to override extant state law concerning Oklahoma's rights in the water at issue that has been on the books since 1935. Petitioners, whom have paid for the water at issue without complaint for decades, should have first pressed a constitutional challenge to the Act in an Oklahoma state court before seeking this relief in this Court. Absent that, Petitioners should express their displeasure with the Act to the Oklahoma Legislature rather than through a dubious challenge to the Act in this Court that five previous state and federal courts have found is wholly without merit.

CONCLUSION

Petitioners have not presented a federal question for review in this Court under Supreme Court Rule 10 or otherwise. They denied Oklahoma's highest court the opportunity to pass upon the constitutionality of the state law that they complain of herein. That law rests upon independent and adequate state law grounds the resolution of which does not depend upon the resolution of a federal question, since relevant Oklahoma state law is not in conflict with federal law. Put simply, Petitioners have not articulated a compelling reason to grant the Petition.

Respectfully submitted,

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